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No. 00-950

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

EVERETT INDUSTRIES, INC.,
Petitioner,
v.
DIVYABALA PATEL AND MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

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31 pp

Questions Presented

1. Whether an employee's state-law handicap discrimination claim was preempted by the federal Labor Management Relations Act, where adjudication of the employee's claim did not require interpretation of any provision of a collective bargaining agreement.

2. Whether the Massachusetts Commission Against Discrimination correctly awarded attorney's fees under a state statute that was enacted shortly after the administrative complaint was filed, where the statute simply provides the same relief in an administrative forum as would be available if the complainant had filed suit and prevailed in court.

List of Parties

All parties appear in the caption of the case on the cover page.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Massachusetts Commission Against Discrimination requests that this Court deny the petition for a writ of certiorari, seeking review of the Massachusetts Appeals Court's decision in this case.

Opinions and Orders Below

The order of the Supreme Judicial Court for the Commonwealth of Massachusetts denying further appellate review is reported at 432 Mass. 1109, 737 N.E.2d 468 (2000), and is reproduced in the appendix to the petition ("Pet. App.") at A-1. The opinion of the Massachusetts Appeals Court is not reported but is reproduced at Pet. App. B-4—B-21. The opinion and order of the Massachusetts Superior Court are not reported but are reproduced at Pet. App. F-1—F-18. The opinion of the full Massachusetts Commission Against Discrimination is reported at

18 MDLR 182 (Sept. 18, 1996) and is reproduced at Pet. App. I-1—I-11. The opinion of the Hearing Officer of the Massachusetts Commission Against Discrimination is reported at 18 MDLR 26 (Jan. 24, 1996) and is reproduced at Pet. App. J-1—J-15.

Jurisdiction

The Massachusetts Appeals Court issued its decision on June 29, 2000. Pet. App. B-1. The Massachusetts Supreme Judicial Court denied a timely application for further appellate review on September 8, 2000. Pet. App. A-1. On December 7, 2000, a timely petition for a writ of certiorari was filed in this Court. *But see* Presentation and Disposition of the Federal Questions Below, *infra* (contesting this Court's jurisdiction over the attorney's fees issue presented in the Petition).

Statutes Involved

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Massachusetts G.L. c. 151B, § 4(16), provides, in pertinent part:

> It shall be an unlawful practice:
>
> . . .
>
> . . . For any employer, personally or through an agent, to dismiss from employment or refuse to hire, rehire or advance in employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business. . . .
>
> In determining whether an accommodation would impose an undue hardship on the conduct of the employer's business, factors to be considered include:—
>
> (1) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets;
>
> (2) the type of the employer's operation, including the composition and structure of the employer's workforce; and
>
> (3) the nature and cost of the accommodation needed.

> Physical or mental job qualification requirement[s] with respect to hiring, promotion, demotion or dismissal from employment or any other change in employment status or responsibilities shall be functionally related to the specific job or jobs for which the individual is being considered and shall be consistent with the safe and lawful performance of the job.

Massachusetts St. 1989, c. 722, § 27, provides:

> Said second paragraph of said section 5 of said chapter 151B [of the Massachusetts General Laws], as so appearing, is hereby further amended by inserting after the twenty-third sentence the following sentence:— In addition to any such relief, the commission shall award reasonable attorney's fees and costs to any prevailing complainant.

The full text of Mass. G.L. c. 151B, § 5, as amended by St. 1989, c. 722, § 27, is reproduced at Pet. App. O-1—O-9.

Massachusetts G.L. c. 151B, § 9, provides, in pertinent part:

> If the court finds for the petitioner it shall, in addition to any other relief and irrespective of the amount in controversy, award the petitioner reasonable attorney's fees and costs unless special circumstances would render such an award unjust.

Statement of the Case

Prior Administrative and Judicial Proceedings

This is an action for judicial review, under the state administrative procedures act, of a decision of a state agency, the Massachusetts Commission Against Discrimination ("the Commission"). The Commission's hearing officer found that Everett Industries ("the employer") had discriminated against Divyabala Patel ("the employee") on the basis of her handicap—hand and shoulder injuries—by denying her a reasonable accommodation—temporary assignment to work not involving heavy lifting—in violation of the state anti-discrimination statute, Mass. G.L. c. 151B, § 4(16). Pet. App. J-10—J-13. The full Commission affirmed the hearing officer's decision and awarded the employee attorney's fees, pursuant to Mass. G.L. c. 151B, § 5, *as amended by* Mass. St. 1989, c. 722, § 27. Pet. App. I-1—I-11.

The employer then filed a complaint for judicial review of the Commission's decision in the Massachusetts Superior Court, pursuant to Mass. G.L. c. 30A, § 14. After the Superior Court affirmed the Commission's decision in all respects, Pet. App. F-1—F-18, the employer appealed to the Massachusetts Appeals Court, which affirmed the Superior Court's decision. Pet. App. B-4—B-21. The Massachusetts Supreme Judicial Court denied the employer's application for further appellate review. Pet. App. A-1.

Facts

Only two facts are material to the questions on which the

petitioner seeks review:[1] (1) In finding the employer liable for handicap discrimination, the hearing officer did not rely on the parties' collective bargaining agreement, which she expressly found to "contain no provisions either allowing or prohibiting changes in work assignment to reasonably accommodate employees with handicaps," Pet. App. J-8; *see also* Pet. App. K, L (the applicable collective bargaining agreements); and (2) the attorney's fees statute under which the Commission awarded fees to the employee became effective in 1990, Pet. App. I-5—I-6 n.3, after the underlying conduct in this case, Pet. App. I-8—I-10, and shortly after the employee filed her complaint with the Commission, Pet. App. J-1, but before all but 3½ hours of the legal services in question were performed.

Presentation and Disposition of the Federal Questions Below

The first question presented in the petition—whether the employee's state-law handicap discrimination claim is preempted by the federal Labor Management Relations Act ("LMRA")—was not raised before the Commission. Rather, it was raised for the first time in the Superior Court, in an amendment to the employer's complaint. Pet. App. H-2. Accordingly, as a matter of state law, it should not have been considered by the lower courts. Mass. G. L. c. 151B, § 6 ("[n]o objection that has not been urged before the commission shall be considered by the court"); *Katz v. Massachusetts Comm'n Against Discrimination*,

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[1]Although not relevant to what issues "properly would be before the Court if certiorari were granted," *cf.* Sup. Ct. R. 15(2), the employer's allegations that the employer had a practice of no light-duty assignments, Pet. at 8, and that the employee sought creation of a new light-duty position, Pet. at 10, are incorrect. *See* Pet. App. J-7, J-6 (finding to the contrary on both points and citing the relevant evidence in the record).

365 Mass. 357, 364, 312 N.E.2d 182, 186 (1974). This rule applies with equal force to jurisdictional issues. *East Chop Tennis Club v. Massachusetts Comm'n Against Discrimination*, 364 Mass. 444, 452, 305 N.E.2d 507, 513 (1973). However, in this case, the Superior Court and the Appeals Court nevertheless considered this claim on its merits, over the Commission's objections, based on the doctrine that jurisdictional defenses may be raised at any time.[2] Pet. App. F-9, B-8—B-9 n.8.

In rejecting the preemption claim on its merits, the Appeals Court applied the test established by this Court for determining whether section 301 of the federal LMRA preempts a state-law claim—i.e., whether adjudication of the state-law claim turns on the meaning of a provision in a collective bargaining agreement. Pet. App. B-8—B-11 (*citing Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988); *United Steelworkers v. Rawson*, 495 U.S. 362, 369 (1990); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985)). Having determined that the Commission's decision did not turn on the meaning of any provision of the applicable collective bargaining agreements, the Appeals Court held that the employee's state-law claim was not preempted by the federal LMRA. *Id.*

The second question presented by this petition—whether the Commission properly gave retroactive effect to a state attorney's fees statute—was presented first at the Commission, Pet. App. I-5—I-6, and then in the Superior and Appeals Courts. Pet. App. F-15—F-16, B-18. In summarily rejecting this claim, the Appeals Court relied solely on a previous decision of the

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[2]It is doubtful that this defense was correctly characterized as jurisdictional, since even if the employee's state-law claim were preempted by the LMRA, state courts would still have jurisdiction to adjudicate the claim but would be required to apply federal labor law in doing so. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 101, 103-04 (1962).

Massachusetts Supreme Judicial Court, *School Comm. of Brockton v. Massachusetts Comm'n Against Discrimination*, 423 Mass. 7, 16, 666 N.E.2d 468, 475 (1996), Pet. App. B-18, which, in turn, relied on an earlier pronouncement of the same court on that issue. *Fontaine v. Ebtec Corp.*, 415 Mass. 309, 320-21 n.11, 613 N.E.2d 881, 889 n.11 (1993).

In the *Brockton* and *Fontaine* cases, the Supreme Judicial Court upheld the retroactive application of this attorney's fees statute on the ground that, rather than create a new substantive right or remedy, it "simply entitled complainants who pursued their cases before the commission to a remedy commensurate with the remedy to which they would have been entitled if they had filed suit and prevailed in a State or Federal court." *Brockton*, 423 Mass. at 16, 666 N.E.2d at 475 (citing *Fontaine*, 415 Mass. at 320, 613 N.E.2d at 889). In so concluding, the Supreme Judicial Court treated this issue solely as one of legislative intent, *Fontaine*, 415 Mass. at 318, 613 N.E.2d at 887 ("Whether a statute applies retrospectively is a question of legislative intent."), rather than one of federal constitutional law.[3]

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[3]Although the Appeals Court characterized the employer's objection to the attorney's fees award as based on "due process" grounds, Pet. App. B-18, in its brief to that court, the employer argued only that the state legislature did not expressly make the statute retroactive and that the Supreme Judicial Court had erred in the *Brockton* case by reading such intent into the statute, thereby overstepping the proper bounds of the judicial branch. Employer's Brief at 40-42. At most, this is a question of state constitutional law, rather than federal law. It is therefore questionable whether any substantial federal question concerning the propriety of the attorney's fees award was even presented to the Appeals Court, *cf.* 28 U.S.C. § 1257(a) (requiring that a federal right be "specially set up or claimed"), much less decided

(continued...)

Cf. Landgraf v. USI Film Products, 511 U.S. 244, 272 (1994) (explaining that issue of retroactive versus prospective application of federal statutes, while originally rooted in economic due process concerns, is now largely a matter of Congressional intent). Because the state legislature's intent is a question of state law, which constitutes an independent and adequate ground for the Appeals Court's decision on the attorney's fees question, this Court lacks jurisdiction to consider that question. *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983); *Bush v. Palm Beach County Canvassing Bd.*, 69 U.S.L.W. 4020, 4021 (U.S. Dec. 4, 2000).

Reasons for Denying the Writ

I. THE APPEALS COURT'S DECISION SIMPLY APPLIES ESTABLISHED LEGAL STANDARDS TO THE FACTS OF THIS CASE.

A. The Preemption Issue Turns on the Application of a Settled Standard—Whether Adjudication of the State-Law Claim Requires Interpretation of a Collective Bargaining Agreement.

In ruling that the employee's state-law employment discrimination claim was not preempted by the federal LMRA, the Appeals Court applied the test established by this Court: whether adjudication of the state-law claim turns on the meaning of a provision in a collective bargaining agreement. Pet. App. B-8—B-11 (*citing Lingle*, 486 U.S. at 405-06; *Allis-Chalmers*, 471 U.S. at 220). Although the employer disagrees with the result the

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[3](...continued)
by that court.

Appeals Court reached, it does not dispute the correctness of the legal standard the Appeals Court applied. Indeed, in its Petition, the employer relies on the very same decisions of this Court and states the applicable standard in terms virtually identical to those the Appeals Court used. *Compare* B-9 ("The 'basic test' for determining whether § 301 preempts a state-law claim is whether a court, 'in passing upon the claim, would be required to interpret the collective bargaining agreement.' *Flibotte v. Pennsylvania Truck Lines, Inc.*, 131 F.3d 21, 26 (1st Cir. 1997), citing to *Lingle . . . .*"), *and* Pet. at 11 ("Section 301 prempts state law claims which require interpretation of a collective bargaining agreement. *Lingle . . . .*; *Allis-Chalmers . . . .*").

Thus, the question presented by the Petition is simply whether the agreed-upon legal standard was correctly applied to the circumstances of this case—i.e., what the applicable collective bargaining agreement provided and what relationship, if any, that agreement had to the employee's state-law employment discrimination claim. As such, it is not an appropriate subject for review by this Court. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

B. The Attorney's Fees Issue Also Turns on the Application of a Settled Standard—Whether the Statute Attaches New Legal Rights, Liabilities, or Responsibilities to Events Completed Before Its Enactment.

The test used by Massachusetts courts in determining whether it is impermissible to give a state statute retroactive effect is the same as that articulated by this Court with respect to federal statutes—whether the statute attaches new legal consequences to past conduct. *Compare Fontaine*, 415 Mass. at 318-20, 613 N.E.2d at 887-88 (whether the statute creates a new legal right or liability with respect to past conduct), *and Landgraf*,

511 U.S. at 280 (whether the statute impairs preexisting rights, increases liability for past conduct, or imposes new duties with respect to completed transactions). Based on its determination that this fee statute, rather than create new rights or responsibilities, "simply entitled complainants who pursued their cases before the commission to a remedy commensurate with the remedy to which they would have been entitled if they had filed suit and prevailed in a State or Federal court," *Brockton*, 423 Mass. at 16, 666 N.E.2d at 475, *cited in* Pet. App. B-18, the Appeals Court upheld the Commission's authority to award fees under this statute, despite the fact that the statute was enacted after the underlying discriminatory conduct and after the complaint was filed at the Commission. Thus, as with the first question presented by the Petition, the second question reduces to whether the Appeals Court correctly applied this proper legal standard to the particular circumstances of this case. As such, this question is similarly unworthy of this Court's review. Sup. Ct. R. 10.

II. THERE IS NO CONFLICT BETWEEN THE CONCLUSIONS REACHED BY THE APPEALS COURT AND THOSE REACHED BY THIS COURT AND OTHER LOWER COURTS IN SIMILAR FACTUAL SITUATIONS.

Noticeably absent from the Petition is any contention that review by this Court is necessary to resolve a previously undecided important federal question or to resolve any conflicts between the Appeals Court's decision and those of the federal courts of appeals or the highest courts of other states. *Cf.* Sup. Ct. R. 10(b), (c) (listing such conflicts as among the "compelling reasons" this Court considers in determining whether to grant a petition for a writ of certiorari). To the contrary, as illustrated by the cases cited by the Appeals Court and in the Petition itself, both of the questions presented by this Petition have already been decided by this Court and by other courts in a manner entirely

consistent with the conclusions reached by the Appeals Court in this case.

A. Where, As Here, Adjudication of a State-Law Claim Does Not Require Interpretation of a Collective Bargaining Agreement, the State-Law Claim Is Not Preempted by the Federal LMRA.

The Appeals Court's ruling on the preemption issue is consistent with prior decisions of this Court and those of federal courts of appeal and other state appellate courts on this issue. In resolving this issue, the Appeals Court applied the "basic test" articulated by this Court and consistently followed by the federal courts of appeals and state appellate courts—"whether [the adjudicator], 'in passing upon the [state-law] claim would be required to interpret the collective bargaining agreement.' *Flibotte v. Pennsylvania Truck Lines, Inc.*, 131 F.3d 21, 26 (1st Cir. 1997), citing to *Lingle v. Norge Div. of Magic Chef, Inc.*[,] 486 U.S. 399, 405-406 (1988)." Pet. App. B-9.

As recognized by the Appeals Court, "There is no indication in the hearing officer's findings that she interpreted the [collective bargaining agreements]" in adjudicating the employee's state-law employment discrimination claim. Pet. App. B-11. Rather, the hearing officer expressly found, based on testimony of the employer's own witness, that the collective bargaining agreements were silent on the relevant points: "The[] collective bargaining agreements contain no provisions either allowing or prohibiting changes in work assignment to reasonably accommodate employees with handicaps. . . . The agreements do not address transfers of employees within the same job classification to different areas of the facility or to different locations within the same area." Pet. App. J-8; *see also* Pet. App. K, L (the applicable collective bargaining agreements).

The fact that the hearing officer consulted the collective

bargaining agreements solely to satisfy herself of their irrelevance cannot, in itself, satisfy the test for LMRA preemption. Where, as in this case, "the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the [state-law] claim to be extinguished." *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994). Rather, as recognized by the Appeals Court, "There must be a 'real interpretive dispute' to preempt state law claims." Pet. App. B-11 (quoting *Lydon v. Boston Sand & Gravel Co.*, 175 F.3d 6, 10 (1st Cir. 1999)).

Alternatively, the employer contends that, in the absence of any relevant express provisions in the collective bargaining agreement, the Commission was required to rely on unwritten terms implied by past practice. Pet. at 15. While past practice may well guide an arbitrator in resolving disputes under a collective bargaining agreement, *cf. United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581-82 (1960) (practices of the shop or industry properly looked to for that purpose), such implied terms have no place in LMRA preemption analysis. The union's acceptance of terms limiting its members' statutory right to be free from discrimination would constitute a waiver of its members' state-law rights. As this Court noted in *Lingle*, such a waiver cannot be lightly inferred but, rather, requires "clear and unmistakable" evidence. 486 U.S. at 410 n.9. In this case, even if past practice were considered, it would yield no such unequivocal result, given the conflicting testimony from the employer's own witnesses as to what its past practice was concerning temporary reassignments. *Compare* J-7 (detailing "evidence that numerous employees had been granted transfers or reassigned to different departments for a variety of reasons") *and* J-9 (employer's senior vice president "testified that [employer] never provided light duty for workers who were injured on the job").

Although the hearing officer did consider evidence of the employer's past reassignment practices, she did so solely as a

means of determining whether it would have been "unreasonable or would have imposed an undue burden upon the company" to accommodate this employee's disability by permitting her to do light-duty work on a temporary basis, as would otherwise be required by state law. Pet. App. J-11. The fact that the same evidence might also be relevant in construing the provisions of a collective bargaining agreement is beside the point. "[E]ven if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and a state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes." *Lingle*, 486 U.S. at 409-10; *Livadas*, 512 U.S. at 123 (same).

Rather than require interpretation of the collective bargaining agreement, so as to warrant preemption under the test articulated by this Court, adjudication of the employee's state-law handicap discrimination claim turned exclusively on "purely factual questions," *Lingle*, 486 U.S. at 407, about the nature of her disability, her qualification to perform the essential functions of her job with a reasonable accommodation, and the feasibility of providing such an accommodation, Pet. App. J-2—J-14, I-2—I-4, F-2—F-12, B-11—B-18, the essential elements of a handicap discrimination claim under Mass. G.L. c. 151B, § 4(16).

This is therefore not a case where the state-law claims and the collective bargaining agreement are "inextricably intertwined." *Allis-Chalmers*, 471 U.S. at 213. Instead, the employee's claim here is premised solely on her independent statutory right not to be discriminated against on the basis of a disability and is therefore not preempted. *Cf. id.* at 212 ("[I]t would be inconsistent with congressional intent . . . to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract); *Lingle*, 486 U.S. at 412-13 (using state-law anti-discrimination claims as example of independent state-law claims that are not preempted by section

301); *Colorado Anti-Discrimination Comm'n v. Continental Airlines, Inc.*, 372 U.S. 714, 724 (1963) (finding no preemption of a state anti-discrimination statute by the federal Railway Labor Act).

The Appeals Court's ruling on the preemption issue is consistent not only with the decisions of this Court on LMRA preemption but also with those of federal courts of appeals and state courts of last resort on that issue. Like the Massachusetts Appeals Court, many federal and state appellate courts have rejected arguments that state-law handicap discrimination claims are preempted by the LMRA. *See, e.g., Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1524-28 (9th Cir. 1995); *Martin Marietta v. Maryland Comm'n on Human Relations*, 38 F.3d 1392, 1399-1402 (4th Cir. 1994); *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1332-35 (6th Cir.) (en banc), *cert. denied*, 493 U.S. 992 (1989); *Ackerman v. Western Elec. Co.*, 860 F.2d 1514, 1517 (9th Cir. 1988); *Miller v. AT&T Network Systems*, 850 F.2d 543, 545-50 (9th Cir. 1988); *Bruce v. Northwest Metal Product Co.*, 79 Wash. App. 505, 512, 903 P.2d 506, 511 (Wash. App. Div. 2 1995), *review denied*, 129 Wash.2d 1014, 917 P.2d 575 (1996); *see also Evans v. Southern Pacific Transp. Co.*, 213 Cal. App.3d 1378, 1383-88, 262 Cal. Rptr. 416, 419-22 (Cal. Ct. App.), *review denied* (1989), *cert. denied*, 496 U.S. 936 (1990) (no preemption under the RLA); *Quinn v. Southern Pacific Transp. Co.*, 76 Or. App. 617, 623-24, 711 P.2d 139, 144 (Or. Ct. App. 1985), *review denied*, 300 Or. 546, 715 P.2d 93 (1986) (same).

The few courts that have reached the opposite conclusion have done so based on express links, absent here, between the state-law claims and the applicable collective bargaining agreements. For example, in *Davis v. Johnson Controls, Inc.*, 21 F.3d 866 (8th Cir.), *cert. denied*, 513 U.S. 964 (1994), the court found preemption based on the fact that, under state regulations, one factor that must be considered in determining whether an accommodation is reasonable under the state handicap discrimination law is "the authority to make the accommodation

under the terms of any *bona fide* agreement." *Id.* at 868. *Cf.* Mass. G.L. c. 151B, § 4(16); 804 C.M.R. § 3.01(5)(e) (containing no such provision). *See Martin Marietta*, 38 F.3d at 1401 (distinguishing *Davis* on that ground); *Jimeno*, 66 F.3d at 1528 (same). Similarly, in *O'Brien v. Consolidated Rail Corp.*, 972 F.2d 1 (1st Cir. 1992), *cert. denied*, 506 U.S. 1054 (1993) (involving the RLA rather than the LMRA and decided before *Livadas* and before this Court's clarification of the RLA preemption standard in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994)), the court found preemption based on the collective bargaining agreement's express provisions governing the method by which an employee's fitness to perform his job is determined and describing the employer's obligations to accommodate disabled employees. *O'Brien*, 972 F.2d at 5. *Cf.* Pet. App. K, L (containing no such provisions). The *O'Brien* court also relied heavily on the fact that the employee had filed a grievance under those very provisions. *Id.*

B. Where, As Here, the Newly Enacted Fee Statute Simply Authorized the Commission to Provide the Same Relief that Would Have Been Available If the Employee Had Chosen to File Her Claim in Court, the Commission Properly Applied that Statute to Award Fees in This Proceeding, Which Was Commenced Prior to the Effective Date of the Act.

The Appeals Court's decision upholding the Commission's authority to award attorney's fees to the employee in this case is entirely consistent with this Court's holdings on retroactive application of statutes in general and of attorney's fees statutes in particular. As this Court clarified in *Landgraf*, the generally applicable presumption against statutory retroactivity applies only where the newly enacted statute "would have genuinely 'retroactive' effect," 511 U.S. at 277, in the sense that

it "attaches new legal consequences to events completed before its enactment." *Id.* at 270. Where the new statute is not retroactive in that sense, "[e]ven absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situtations." *Id.* at 273.

Repeatedly, this Court has identified the application of newly enacted attorneys' fees statutes as among the situations in which application of new statutes to pending cases is appropriate. The first, and most general, reason that it is permissible to apply newly enacted fee statutes to already pending cases—even after those cases have been tried—is that "[a]ttorney's fee determinations . . . are 'collateral to the main cause of action' and 'uniquely separable from the cause of action to be proved at trial.'" *Landgraf*, 511 U.S at 277 (quoting *Hutto v. Finney*, 437 U.S. 678, 695 n.24 (1978) (upholding the application of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, to pending cases on that ground)). As explained by this Court, an attorney's fees remedy "does not compensate the plaintiff for the injury that first brought him into court," *Hutto*, 437 U.S. at 695 n.24, thereby attaching new legal consequences to past conduct. "Instead, the award reimburses him for a portion of the expenses he incurred in seeking [judicial] relief." *Id.* In other words, a fee statute does "no[t] . . . change the substantive obligation of the parties," *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 721 (1974)—here, to provide reasonable accommodations to disabled employees.

A second reason, stemming from the first, is that, because a fee statute does not "make unlawful conduct that was lawful when it occurred," *Landgraf*, 511 U.S. at 281-82, a party who acts unlawfully is already on notice that its conduct may subject it to monetary or other liability. It is therefore unlikely that a party will be able to show that "the obligation under [the new fee statute], if known, . . . would have caused [it] to order its [prelitigation] conduct so as to render . . . litigation unnecessary

and thereby preclude the incurring of such costs," making retroactive application of the statute inequitable. *Bradley*, 416 U.S. at 721; *cf. Landgraf*, 511 U.S. at 282 (upholding, on this ground, retroactive application of compensatory damages remedy to conduct that was already prohibited by Title VII).

In this case, the employer does not even claim that prior knowledge of its fee obligation would have altered its underlying discriminatory conduct, only its conduct in litigating this case. Pet. at 21. As to that conduct, if the employer wanted to limit his fee liability, it could have settled the case as soon as the fee statute was enacted, thereby avoiding all but $490 of the fees ultimately awarded. Pet. App. I-9 (indicating that only $490—$612.50 minus a 20 percent reduction—of the total $24,368 fee award was attributable to services performed prior to the enactment of the fee statute in 1989). At most, this argument would invalidate the application of the fee statute to the 3½ hours of services that were rendered before the statute's enactment. *Cf. Martin v. Hadix*, 527 U.S. 343, 360-62 (1999) (invalidating application of fee statute to services performed before the statute's effective date but finding "no retroactivity problem" with applying the statute to services performed after the statute's effective date).

A third rationale recognized by this Court—and the one expressly applied by the Massachusetts Supreme Judicial Court in upholding the retroactive application of the fee statute at issue here—is that, even before the Commission was authorized to award fees, fees were available to successful discrimination complainants who chose to litigate their claims in court rather than in an administrative forum.[4] *Brockton*, 423 Mass. at 16, 666

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[4]Under Mass. G.L. c. 151B, § 9, a person claiming to be the victim of illegal discrimination may, 90 days after filing a complaint with the Commission, file an action in court. "If the

(continued...)

N.E.2d at 475, *cited in* Pet. App. B-18. Under similar circumstances—where fees were already available under a different legal theory—this Court upheld the application of a new fee statute to already pending actions, on the ground that the new statute "merely serves to create an additional basis or source for the [defendant]'s potential obligation to pay attorney's fees. It does not impose an additional or unforeseeable obligation upon it." *Bradley*, 416 U.S. at 721; *cf. Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997) (upholding retroactive application of a statute that "affect[s] only *where* a suit may be brought, not *whether* it may be brought at all").

III. BECAUSE THE ATTORNEY'S FEES STATUTE AT ISSUE HERE IS ALREADY MORE THAN TEN YEARS OLD, THE QUESTION OF WHETHER IT SHOULD BE APPLIED TO PRE-ENACTMENT CASES IS NOT AN IMPORTANT QUESTION WORTHY OF CONSIDERATION BY THIS COURT.

A central consideration applied by this Court in determining whether to grant a petition for a writ of certiorari is whether the question presented is "important," Sup. Ct. R. 10, not merely to the parties involved but to the public at large. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955). The attorney's fee question presented here cannot be deemed important in either sense.

Even as to the parties themselves, the amount at issue, which may be as little as $490, as discussed above, is certainly

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[4](...continued)
court finds for the petitioner it shall, in addition to any other relief and irrespective of the amount in controversy, award the petitioner reasonable attorney's fees and costs unless special circumstances would render such an award unjust." *Id.*

not large enough to render the case "important" on that ground. More to the point, the question presented—concerning the application of this statute to cases filed before its enactment in 1990, now more than ten years ago—is unlikely to be of any continuing significance to many, if any, other current litigants. For that reason as well, the Petition, at least on the attorney's fees issue, should be denied.

Conclusion

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully sumbitted,

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